United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-7235

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P/S

United States Court of Appeals
For the Second Circuit

WINTHROP J. ALLEGAERT, as Trustee of duPont Walston Incorporated,

Plaintiff-Appellant,

against

H. ROSS PEROT, ELECTRONIC DATA SYSTEMS CORPORATION, duPONT GLORE FORGAN INCORPORATED, WILLIAM K. GAYDEN, MORTON H. MEYERSON, MILLEDGE A. HART, III, MARGOT PEROT, MERVIN L. STAUFFER, PHM & Co., CHARLESTON INVESTMENT COMPANY, E.D. SYSTEMS CORPORATION, NEW YORK STOCK EXCHANGE, INC., DANIEL J. CULLEN, WILLIAM D. FLEMING, GEORGE T. THOMSON and CHARLES W. COX,

Defendants-Appellees,

and

DOUGLAS E. DeTATA, JOHN J. DOUGHTY, ALLAN BLAIR, and D. TIPP CULLEN,

Defendants.

On Appeal from the United States District Court for the Southern District of New York

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REPLY BRIEF OF PLAINTIFF-APPELLANT WINTHROP J. ALLEGAERT, TRUSTEE IN BANKRUPTCY OF duPONT WALSTON INCORPORATED

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UNITED STATES COURT OF APPEALS
For the Second Circuit

No. 76-7235

WINTHROP J. ALLEGAERT, as Trustee
of duPont Walston Incorporated,

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-against-

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-and-

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REPLY BRIEF OF WINTHROP J. ALLEGAERT, TRUSTEE IN BANKRUPTCY OF duPONT WALSTON INCORPORATED

Preliminary Statement

Winthrop J. Allegaert, the Trustee in Bankruptcy of duPont Walston Incorporated, submits this reply brief in response to the briefs filed by the Perot Group and the NYSE.

I.

THE TRUSTEE IS NOT BOUND BY ARBITRATION CONTRACTS OF THE BANKRUPT

The principal subject of this reply brief is Truck Drivers Local Union No. 807, International Brotherhood of Teamsters v. Bohack Corporation, Docket Nos. 75-7694, 76-3003 (2d Cir. August 9, 1976), decided too recently to be discussed in the Trustee's main brief. Ignoring the facts of Truck Drivers and the statutory context in which it arose, the Perot Group has quoted selectively from the case in an effort to support its positions.* In fact, Truck Drivers stands for none of the propositions for which the Perot Group has cited it. Rather, Judge Gurfein's opinion in Truck Drivers not only confirms the Trustee's analysis of the law, but also supplies an additional reason why the orders appealed from should be reversed.

Several months after signing a collective bargaining agreement with the Teamster's Union, Bohack filed a petition for an arrangement under Chapter XI of the Bankruptcy Act and was given permission to continue its business as a "debtor-in-possession." Thereafter, Bohack terminated a number of union truck drivers.

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* It should be noted that the purported quotation from Truck Drivers at lines 2-4 of p. 17 of the Perot Group's brief does not appear in this Court's opinion.

The ensuing procedural developments are rather complex, but a knowledge of certain of them is necessary to an understanding of the case. First, the union sought arbitration before a body which Bohack claimed was not the proper tribunal under the collective bargaining agreement. After objecting to the jurisdiction of the tribunal, Bohack refused to participate and refused to comply with the ensuing award. Thereafter Bohack for the first time sought permission of the bankruptcy court to reject the collective bargaining agreement. Before that question was decided, the union commenced a plenary action to compel Bohack to specifically perform the collective bargaining agreement, including the arbitration provisions, and Bohack counterclaimed seeking arbitration if authorized to do so by the bankruptcy court.

Truck Drivers is different from the situation presented here in two material respects. First, Bohack was a Chapter XI debtor-in-possession, not a trustee in bankruptcy. For obvious reasons, the Bankruptcy Act and Rules provide for closer supervision by the bankruptcy court of the activities of a debtor-in-possession than they do for a trustee in bankruptcy. Thus, while a trustee in bankruptcy has the power unilaterally to reject executory contracts of the bankrupt, Bankruptcy Act Section 70b, 11 U.S.C. § 110(b), a debtor-in-possession must obtain approval of the bankruptcy court in order to reject an executory contract.

Bankruptcy Act Section 313(1), 11 U.S.C. § 713(1). Second, although Bohack was seeking to reject the contract, Bohack desired to arbitrate assuming that permission of the bankruptcy judge could be obtained. In its counterclaim in the district court, Bohack had affirmatively sought such arbitration, and in its brief to this Court, Bohack wrote that it was "ready and willing" to go to arbitration once the bankruptcy judge's permission was obtained.* (Bohack Brief, pp. 32-33). In the present case, of course, the Trustee does not desire to arbitrate.

The Perot Group's failure to recognize these differences has led it to misapply the Truck Drivers case on the issues of (1) the Trustee's power to reject an executory contract to arbitrate and (2) the effects of such a rejection.

The Perot Group's repeated reliance on the statement in Truck Drivers that an arbitration agreement "is not subject to a unilateral disavowal" by a debtor-in-possession is entirely misplaced. Judge Gurfein was merely recognizing the elementary principle that a debtor-in-possession needs court approval to reject an executory contract. This is made absolutely clear in the following sentence of the opinion in which Judge Gurfein observed that a debtor-in-possession

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* Thus, Chief Judge Mishler stated in the District Court that the issue was "the advisability of granting the debtor leave to arbitrate", quoted in Truck Drivers, Slip Op. at 5168 (emphasis added).

could not

> "abrogate a contractual obligation save by statutory or judicial permission. Bankruptcy Act § 313, 11 U.S.C. § 713." Slip Op. at 5175 (emphasis added).

Of course, what this case involves is a trustee in bankruptcy who has express statutory authority unilaterally to reject executory contracts without court approval.

Second, the Perot Group's claim that Truck Drivers is authority for the proposition that a trustee in bankruptcy who has disaffirmed an arbitration agreement may nevertheless be compelled to arbitrate is without foundation. Although Bohack wished to disaffirm the collective bargaining agreement, Bohack had actually sought arbitration. Thus, Bohack was in a position similar to that of Tobin, the plaintiff-trustee in Tobin v. Plein, 301 F.2d 378 (2d Cir. 1962). Tobin, who had rejected the contract containing the arbitration clause, was held entitled to arbitrate his dispute with Plein because the contractual right to arbitrate -- a right not conditioned on any further performance by the bankrupt or trustee -- had passed to the trustee under Section 70a(6) of the Bankruptcy Act, 11 U.S.C. § 110(a)(6). In holding that Bohack could seek to arbitrate even if it were permitted to reject the contract, Judge Gurfein did no more than reaffirm Tobin. The question whether a debtor or a trustee could be forced to arbitrate after disaffirmance was not presented.

After an analysis of the Bankruptcy Act and Rules and the relevant precedents, Judge Gurfein reached the following conclusions in Truck Drivers: (a) a debtor-in-possession may reject the bankrupt's arbitration contracts, if it has been permitted by the bankruptcy court to reject them; (b) a debtor-in-possession which has rejected an arbitration agreement may nevertheless seek to arbitrate; (c) arbitration with a debtor-in-possession may not be permitted even where a contract assumed by the debtor requires arbitration unless the party urging arbitration has first obtained permission from the bankruptcy court under Bankruptcy Rule 919(b); thus, the original arbitration had been void. The first two of these conclusions and the reasoning by which they were derived are fully consistent with the analysis of the law advanced by the Trustee on this appeal. The third conclusion supplies an additional ground on which the orders appealed from must be reversed.

Bankruptcy Rule 919(b), which supersedes Section 26 of the Bankruptcy Act, 11 U.S.C. § 49,* provides that

> "On stipulation of the parties to any controversy affecting the estate the

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* Section 26a of the Act, 11 U.S.C. § 49(a), provides that

> "The receiver or trustee may, pursuant to the direction of the court, submit to arbitration any controversy arising in the settlement of the estate."

> court may authorize the matter to be submitted to final and binding arbitration."

In Truck Drivers, this Court held that prior court approval was required under Rule 919(b) not only for arbitrations pursuant to agreements made after bankruptcy but also for arbitrations held pursuant to agreements made by the bankrupt prior to the bankruptcy:

> "we can see no reason why court approval must be had for arbitration upon a stipulation (Rule 919(b)) and dispensed with when the arbitration was agreed upon in an earlier contract. In either case the rights of creditors are involved and the obligation of the bankruptcy court to protect all concerned is the same." Slip Op. at 5178.

Since Rule 919(b) applies to trustees as well as to debtors-in-possession, this ruling is fully applicable here. Having failed to "seek and receive authorization" for arbitration from Judge Babitt -- who, it should be noted, authorized and directed the Trustee to bring this suit* -- the Perot Group could not properly seek a stay pending arbitration from Judge Knapp. Truck Drivers, Slip Op. at 5177. Thus Truck Drivers sets forth an additional ground on which the orders appealed from should be reversed.

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* Order signed July 1, 1975 in Matter of duPont Walston Incorporated, f/k/a Walston & Co., Inc., 74 B. 344.

* * *

The executory contract provisions relieve the trustee of the duty of performing all contractual duties of the bankrupt. The Perot Group, however, claims that while arbitration clauses may not be enforced on claims against a trustee, they may be enforced on claims by a trustee. The source of this theory is the circumstance that the cases holding that a trustee or a debtor-in-possession does not have to arbitrate involve claims against the trustee or debtor while the case relied on by the court below -- Schilling v. Canadian Foreign Steamship Co., 190 F. Supp. 462 (S.D.N.Y. 1961) -- involves a claim by a trustee.

There is absolutely no reason in law or logic for treating this difference as a legally-significant distinction. The cases do not treat the factor as determinative, and there are no reasons of policy for giving it weight. The sole justification offered by the Perot Group for treating the two situations differently is that arbitration of a claim against the estate would affect the amount of the other creditors' claims and could result in a distribution preference among creditors. Perot Group Brief, p. 19. However, as the facts of this case dramatically illustrate, arbitration of a claim by the estate could have the same result. The estate administered by the Trustee has less than $3 million against creditors' claims of over $75 million.

Trustee's Brief, p. 7. The Trustee has alleged that one of the principal reasons for this bankruptcy is that these defendants, through their control of the bankrupt, were able to siphon off the bankrupt's assets in order to prefer themselves to the bankrupt's other creditors (J.A. 53-59). The Trustee seeks compensatory damages of $45 million and punitive damages in an equal amount. If the trustee does not get a "legally correct adjustment"* of his claims against these defendants they could succeed in creating a preference over Walston's other creditors, thereby affecting the amount of those creditors' claims.

The Perot Group would have this Court adopt a rule whereby a creditor who does not receive a preference prior to bankruptcy and files a claim in the bankruptcy proceeding cannot compel the trustee to arbitrate, but a creditor who succeeds in preferring himself prior to bankruptcy can compel the trustee to arbitrate against his will. Such a rule would be illogical, inequitable and inconsistent with the letter and spirit of the Bankruptcy Act.

* * *

While the question whether a trustee is making a claim or defending one is not relevant in determining whether arbitration is appropriate, the question whether the trustee is seeking arbitration or resisting it is controlling. Ignoring this distinction, the Perot Group has sought to read Tobin

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* Wilko v. Swan, 346 U.S. 427, 438 (1953).

v. Plein, 301 F.2d 378 (2d Cir. 1962), a case in which a trustee wanted to arbitrate, as authority that he may be compelled to do so. In Tobin, Judge Clark properly concluded that a trustee in bankruptcy could enforce an arbitration clause even though he had rejected the contract containing it, and then set out to explain this result. As his first explanation, Judge Clark stated that if a breach of contract had occurred prior to bankruptcy, the bankrupt would have owned a right to arbitrate on the day of bankruptcy which would pass to the trustee under Section 70a(6) of the Act, 11 U.S.C. § 110(a)(6), regardless of whether the contract containing the arbitration clause was assumed or rejected by the trustee.* In the second explanation offered, Judge Clark

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* In reaching the conclusion that bankruptcy did not relieve the non-bankrupt party of liability for pre-bankruptcy breaches under a contract the trustee had rejected, Judge Clark observed that the bankrupt was not relieved of responsibility for pre-bankruptcy breaches either, citing Central Trust Co. v. Chicago Auditorium Association, 240 U.S. 581 (1916). The Perot Group reads this passage as support of its claim that contractual obligations of the bankrupt are specifically enforceable against his trustee. This reading is wholly unsupportable. As the Central Trust Co. case makes clear, the only remedy provided by the Bankruptcy Act for breaches of contract by the bankrupt is the filing of a claim for damages in the bankruptcy court; the law nowhere provides for specific performance by a trustee of a contract he has rejected.

inaccurately stated a principle of contract law* which was correctly stated in this Court's recent decision in Truck Drivers. The Perot Group has seized upon Judge Clark's statement, imported it into another context, and used it in support of its bizarre argument that a contractual duty to arbitrate does not exist for the purpose of the statute permitting a trustee to reject all executory contractual obligations of the bankrupt but does exist for the purpose of binding the trustee. Judge Clark stated that if Plein had materially breached the contract prior to bankruptcy, the bankrupt would have been relieved of all duties under it. Since there would have been no duties of the bankrupt left to assume or reject when Tobin became trustee, Section 70b, the executory contract section, would have been "wholly inapplicable." This statement is not precisely accurate; even if Plein had materially breached he still could have required the bankrupt to carry out its agreement to arbitrate.** As this Court recently recognized in Truck Drivers, a party to a contract can enforce a contractual right to arbitrate even if

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* The question whether a trustee in bankruptcy (1) inherits a contract right from the bankrupt by operation of Section 70a(6) even if he rejects the contract or (2) needs to assume the contract under Section 70b in order to enjoy that right is really one of the contract law. The determinative factor is whether the bankrupt could have enforced the right without any further performance on his part; if further performance were required, the trustee would have to assume the contract under Section 70b and supply the performance in order to enjoy the right.

** Since Plein was resisting arbitration, it is understandable that this possibility was overlooked.

he is in material breach.* See Slip Op. at 5179 n. 15. Of course, this principle of law supplies the true justification for the Tobin result: Tobin, as successor to the bankrupt's rights under Section 70a(6), could enforce the arbitration clause in the agreement even though the bankrupt had breached the agreement by going into bankruptcy since even a party in material breach of the contract can enforce an arbitration clause. Thus, Tobin could arbitrate not because Section 70b was "wholly inapplicable" but because even after it was applied, it did not affect his right to arbitrate. But application of Section 70b does relieve the trustee of the duty to arbitrate as it relieves him of all other contractual duties of the bankrupt.

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* Rejection of an executory contract is deemed to be a breach giving the other party the right to file a claim for damages in the bankruptcy proceeding. See Section 63 of the Act, 11 U.S.C. § 103.

II

THE TRUSTEE'S CLAIMS UNDER THE BANKRUPTCY ACT ARE NOT ARBITRABLE

In support of his position that actions under the Bankruptcy Act to recover fraudulent or preferential transfers are not arbitrable,* the Trustee cited a number of cases holding causes of action under other federal statutes not arbitrable. Trustee's Brief, pp. 31-34. The Perot Group seeks to distinguish those cases by arguing that the statutes involved made federal jurisdiction exclusive while the Bankruptcy Act provides for concurrent jurisdiction of state and federal courts.** In fact, the leading case on which the Trustee relies -- Wilko v. Swan, 346 U.S. 427

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* The implication in the Perot Group's brief that trustees in bankruptcy had been ordered to arbitrate fraudulent transfer and preference claims in Schilling v. Canadian Foreign Steamship Co., 190 F. Supp. 462 (S.D.N.Y. 1961), and other cases (see Perot Group Brief, pp. 24, 39) is false. Prior to the decision of the disrict court, no trustee had ever been ordered to arbitrate such claims.

** The Perot Group seeks support for this analysis by improperly classifying Fallick v. Kehr, 369 F.2d 899 (2d Cir. 1966), as a concurrent jurisdiction case. At the time Fallick was decided, the issue of the effect of a bankruptcy discharge was routinely determined in state court actions brought by creditors; under the doctrine of Local Loan Co. v. Hunt, 292 U.S. 234 (1934), such determinations could be made in federal court only in certain "unusual circumstances." Hence, there was no absolute right to a federal forum presented in Fallick. Had there been, the result would have been different; as Judge Feinberg noted, "an advance agreement to waive the benefits of the [Bankruptcy] Act would be void." 369 F.2d at 904.

(1953) -- is not an exclusive jurisdiction case but a concurrent jurisdiction case. Wilko was suing under the Securities Act of 1933, 15 U.S.C. §§ 77a et seq., a statute which expressly provides that suits for its violation may be brought either in federal court or in state court. See Section 22(a) of the Act, 15 U.S.C. § 77v(a). Nevertheless, the Supreme Court held that the defendant could not compel arbitration.

The cases do not turn on whether the federal forum is available on a concurrent or an exclusive basis;* instead, they turn on a careful analysis of such factors as the extent to which the public interest is involved and the degree to which judicial procedures are better suited to resolving the kinds of issues presented. The string of cases cited by the Perot Group permitting arbitration under such federal statutes as the Miller Act were cases in which no significant questions of federal policy could be found. See, e.g., United States ex rel. Capolino Sons, Inc. v. Electronic & Missile Facilities, Inc., 364 F.2d 705, 708 (2d Cir.), cert. dismissed under Rule 60, 385 U.S. 924 (1966). Cases of this kind have been repeatedly dismissed as of little value in determining whether arbitration should be permitted under statutes

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* The granting of the right to proceed in state court as well does not denigrate the value of the right to proceed in federal court. In the bankruptcy context, the right to resort to state court may permit the trustee to economize on litigation of simple cases where the state court is geographically closer, or has less crowded dockets or expedited procedures for small claims.

involving important federal policies. See, e.g., Wilko v. Swan, 346 U.S. 427, 435 n. 21 (1953) (Securities Act); American Safety Equipment Corp. v. J. P. Maguire & Co., 391 F.2d 821, 826 (2d Cir. 1968) (antitrust laws).

While the Trustee has made a detailed analysis of of the unsuitability of arbitration for resolving federal statutory claims of the kind advanced here, the Perot Group has avoided the issue entirely, preferring to rest on general statements to the effect that federal courts favor arbitration. When the issue is confronted, it is quite clear that the Trustee's claims under the Bankruptcy Act should be decided in the federal courts. Trustee's Brief, pp. 32-41.

III.

THE TRUSTEE'S CLAIM ALLEGING COMMON LAW FRAUD SHOULD NOT BE SENT TO ARBITRATION

The Trustee has alleged common law fraud in Count X of his complaint and has sought punitive damages on that count. In a recent case, the New York Court of Appeals ruled that the awarding of punitive damages by arbitrators would violate the strong public policy of the State of New York. See Garrity v. Lyle Stuart, Inc., (No. 293, July 6, 1976). In an opinion by Chief Judge Breitel, the court held that

> "The law does not and should not permit private persons to submit themselves to punitive sanctions of the order reserved to the State." Slip Op. at 6.

In light of this holding, it would appear appropriate not to send the common law fraud count to arbitration; otherwise, the Trustee would be put to the burden of trying the case twice -- first in arbitration and then in court -- in order to obtain all of the items of damage he seeks.

IV.

WHERE NON-ARBITRABLE STATUTORY CLAIMS ARE PRESENTED, THEY SHOULD BE TRIED FIRST

The Perot Group claims that the line of authorities cited by the Trustee that non-arbitrable federal statutory issues should be tried in advance of arbitration has been undermined by this Court's per curiam decision in N.V. Maatschappij Voor Industriele Waarden v. A. O. Smith Corp., 532 F.2d 874 (2d Cir. 1976). However, what A. O. Smith involved was a tactical assertion of non-arbitrable claims in an effort to escape a court order requiring arbitration. Plaintiff filed an action to compel arbitration of certain disputes under an agreement. After Judge Bonsal ordered arbitration, one of the defendants for the first time asserted antitrust defenses to the agreement and attempted to use these defenses to avoid arbitration. This Court held that Judge Bonsal properly had blocked this attempt. In its opinion, the Court made it clear that the unusual fact situation presented in A. O. Smith led to this result:

> "The combination of factors present in this case -- the lateness of the assertion of the antitrust claims, the nature of the antitrust and patent defenses and their likely severability -- distinguishes the earlier cases cited and leads to the conclusion that Judge Bonsal was not in error when he allowed the arbitration to proceed first." Id. at 877.

Here, the federal statutory claims are at the heart of the Trustee's case and are inextricably intertwined with his other claims. The cases the Trustee has cited requiring that the federal claims be tried first are not diminished by A. O. Smith. Trustee's Brief, pp. 61-62.

V.

THE STAY OF THE ACTION AS TO THE NYSE WAS AN ABUSE OF DISCRETION

A. The Stay As To The NYSE Is Reviewable By This Court.

Pointing out that it moved for a stay pursuant to the inherent powers of the court rather than pursuant to an agreement for arbitration under 9 U.S.C. § 3, the NYSE argues that as applied to it, Judge Knapp's orders are interlocutory and not appealable. However, in a number of cases stays of indefinite duration pending completion of other proceedings have been held appealable as final orders. See, e.g., Idlewild Bon Voyage Liquor Corp. v. Epstein, 370 U.S. 713 (1962); McSurely v. McClellan, 426 F.2d 664 (D.C. Cir. 1970); Amdur v. Lizars, 372 F.2d 103 (4th Cir. 1967); Kelley v. Metropolitan County Board of Education, 436 F.2d 856, 862 (6th Cir. 1970), cert. denied, 409 U.S. 1001 (1972). Even if Judge Knapp's orders were not final orders as to the NYSE, they would be reviewable by a writ of mandamus. Where a notice of appeal has been filed from an order this Court has regarded as interlocutory, it has treated the notice of appeal as a motion for leave to file a petition for a writ of mandamus. See, e.g., International Products Corp. v. Koons, 325 F.2d 403, 407 (2d Cir. 1963). Recently, this Court treated a notice

of appeal from an interlocutory order regarding arbitration as such a motion and reached the merits of the dispute by that route. See Aaacon Auto Transport Inc. v. Ninfo, 490 F.2d 83 (2d Cir. 1974) (per curiam). Whether treated as an appeal from a final order or as a motion for leave to file a petition for a writ of mandamus, the Trustee's notice of appeal has effectively brought the merits of Judge Knapp's ruling on the stay as to the NYSE to this Court for review.

B. Judge Knapp Abused His Discretion In Staying The Action As To The NYSE

In seeking to find some way in which the stay as to the NYSE might achieve some economy or saving, the NYSE makes the wholly unsupported claim that the other defendants are "more than solvent" and could pay an arbitration award for all of the amount sought -- $90 million -- thus making a subsequent suit against the NYSE unnecessary. NYSE Brief, p. 8. The great majority of the defendants are inactive corporations or individuals -- some of whom have explicitly claimed limited financial means in affidavits filed by their counsel in the district court.* At most two or three defendants could pay any significant part of such an award, and there can be no guarantee that

* Affidavit of Samuel M. Koenigsberg sworn to November 5, 1975.

an award would be made against them. The plain facts are that the stay as to the NYSE can accomplish little or no good and will severely prejudice the Trustee. Trustee's Brief, pp. 55-63.

CONCLUSION

For the foregoing reasons and the reasons set forth in the Trustee's main brief, the orders appealed from should be reversed.

Dated: New York, New York
September 27, 1976

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
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and :

DOUGLAS E. DeTATA, et al., :

Defendants. :

- -x

AFFIDAVIT
OF SERVICE

No. 76-7235

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

Mario A. Rosado, being duly sworn, deposes and says that he resides at 2786 Creston Avenue, Bronx, New York 10468; that on the 27th day of September 1976 he served the within Reply Brief on the attorneys for H. Ross Perot, et al. herein by mailing two copies thereof, securely enclosed in a post-paid, properly addressed wrapper, in the mail box under the exclusive care and custody of the United States Postal Service at the corner of Wall Street and Broadway, New York, New York, addressed to said attorneys as follows:

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Deponent is over the age of 18 years and not a party to this action.

Maria A Rosado

Sworn to before me this
27th day of September 1976.

Helene Glass

Notary Public

HELENE GLASS
Notary Public, State of New York
No. 31-6535250
Qualified in New York County
Commission Expires March 30, 1978

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WINTHROP J. ALLEGAERT, :

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Defendants-Appellees, :

and :

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Defendants. :

- -x

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